No. 00-1618

IN THE

Supreme Court of the United States

INDECK ENERGY SERVICES, INC. and
INDECK SAGINAW LIMITED PARTNERSHIP,

Petitioners,

v.

CONSUMERS ENERGY COMPANY and
CMS ENERGY CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

To deal with rapid changes in the electric utility industry, the Michigan Public Service Commission conducted a number of interrelated proceedings dealing with electric rates, supply and access. Petitioner Indeck was an active litigant in several of those proceedings. Pursuant to its explicit statutory jurisdiction, the MPSC issued a series of orders permitting Consumers Energy and Detroit Edison, Michigan's two largest electric utilities, to enter into discount contracts with their major industrial customers, including the Big Three automakers, to encourage those customers not to leave those utilities and thereby increase rates for their millions of remaining customers. Those orders were approved by the Michigan courts.

Indeck, which sought to supply electricity to a manufacturing plant owned by General Motors, Consumers Energy's largest customer, sued Consumers under the Sherman Act, claiming that by entering into a discount contract with GM that had been approved by the MPSC, Consumers had violated that act. The district court dismissed the suit on the grounds of the state action doctrine and Indeck's failure to plead facts showing antitrust injury.

The Sixth Circuit did not reach the state action ruling. Applying precedent of this Court and its own earlier rulings, the Sixth Circuit held that Indeck had failed to plead antitrust injury, thereby depriving it of antitrust standing, because it did not allege facts showing an injury to competition, but only injury to itself.

The question presented is:

Did the Sixth Circuit correctly apply well-established antitrust injury and antitrust standing principles to the allegations of Indeck's complaint?

STATEMENT PURSUANT TO RULE 29.6

Respondent Consumers Energy Company is a wholly owned subsidiary of Respondent CMS Energy Corporation. Respondent CMS Energy Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Consumers Energy Company ("Consumers") is Michigan's largest public utility. It is a wholly-owned subsidiary of CMS Energy Corporation ("CMS"). The two plaintiffs (collectively "Indeck" or "petitioner") construct and operate cogeneration systems, which generate both electricity and steam. Compl. ¶¶1, 5. Indeck contends that it signed a contract with General Motors ("GM") in 1994 to develop a cogeneration facility in Saginaw and that it was being considered by GM for development of a similar project in Flint. Compl. ¶¶24, 26. Indeck alleged that respondents, through actions that it characterized as anti-competitive, forestalled Indeck's proposed cogeneration projects.

The conduct of which Indeck complained was closely regulated by the Michigan Public Service Commission ("MPSC") and the Federal Energy Regulatory Commission ("FERC"). The principal focus of Indeck's complaint was a contract between Consumers and GM that was specifically approved by the MPSC under a clearly articulated state policy to displace competition with regulation. The other allegedly wrongful acts were also the subject of detailed regulation by the MPSC in proceedings in which Indeck was or could have become a participant. Indeck's disappointment as a bidder did not reflect any harm to competition, which was developing under specific orders and rules established by the MPSC. Consumers therefore sought summary judgment under Rule 56 and dismissal under Rule 12(b)(6) on the basis of the state action doctrine and on the failure of Indeck to allege antitrust injury.[1] Consumers' motion was supported by the affidavit of David A.

1. CMS separately sought and obtained dismissal on the basis that, under the *Copperweld* doctrine, it could not be liable for conspiring with its wholly-owned subsidiary, a ruling that is not the subject of Indeck's petition.

Mikelonis, Consumers' Senior Vice President and General Counsel, which explained twenty years of complex regulatory history necessary to an understanding of the context in which Indeck's complaint should be considered. Pursuant to the district court's order, Consumers produced more than 70,000 pages of documents to Indeck and produced Mr. Mikelonis for a three-day deposition on the content of his affidavit.

The district court granted Consumers' motion, ruling that the state action doctrine precluded the antitrust claims against it. The court also concluded that Indeck had not alleged injury of the type the antitrust laws were intended to prevent, and accordingly lacked standing to assert its antitrust claims. The court therefore found it unnecessary to decide Consumers' statute of limitations defense to the claim that in 1987 it had favored its affiliate, the Midland Cogeneration Venture ("MCV"), in the procurement of power supplies.

Pursuant to Michigan statutes, MPSC-promulgated rules, and orders entered in MPSC proceedings, competition among suppliers of utility services has been tightly regulated by the MPSC. Mikelonis Aff. ¶¶11-12, C.A. App. 88.[2] The implementation by the MPSC of FERC rules regarding cogeneration projects resulted in more than fifteen years of complex regulatory proceedings and multiple appeals in which Indeck was an active participant.[3] The result of that litigation was that the MPSC:

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2. References to "C.A. App." are to the Joint Appendix in the Court of Appeals.

3. Mikelonis Aff. ¶32, C.A. App. 109. *Consumers Power Co. v. MPSC*, 189 Mich. App. 151 (1991), 472 N.W.2d 77, *leave to appeal denied*, 439 Mich. 922, 479 N.W.2d 644, *reh. denied*, 442

(Cont'd)

- approved settlements in 1993 and 1996 that allocated procurement by Consumers of cogeneration capacity among competing affiliated and non-affiliated power suppliers, including Indeck;

- established the rates to be paid by Consumers to the power suppliers;

- established a competitive bidding framework for future solicitations of capacity from cogenerators. Mikelonis Aff. ¶¶46-48, C.A. App. 122-124.

In addition to regulating the competition by cogenerators to provide power supplies to Consumers, the MPSC also pervasively regulated the rates paid by retail customers for electricity purchased from Consumers. The cost structure of a utility system includes substantial fixed costs that must be borne by the entire customer base. All other things being equal, the departure of any one customer increases the fixed costs that must be absorbed by all other customers. The allocation of the costs among these customer groups is controlled by the MPSC in a process called "rate design." The MPSC-mandated rate design historically required large-load customers such as GM to bear a disproportionately greater share of such fixed costs, thereby subsidizing smaller customers. Mikelonis Aff. ¶15, C.A. App. 91.

(Cont'd)

Mich. 911, 503 N.W.2d 446 (1993); *ABATE v. MPSC*, 216 Mich. App. 8, 548 N.W.2d 649 (1996). Indeck was a party in both appeals. *See also Attorney General v. MPSC No. 2*, 237 Mich. App. 82, *leave to appeal denied*, 462 Mich. 866 (2000).

In the 1990s these large-load customers began to consider other sources for obtaining electricity. Consumers, like other utilities who faced the same situation, sought to retain these customers and thereby avoid having the additional fixed costs imposed on remaining customers, primarily homeowners and small businesses. Mikelonis Aff. ¶55, C.A. App. 134-135. Initially, Consumers did this by proposing a complete redesign of electric rates to eliminate the subsidy borne by industrial users, a proposal rejected by the MPSC. Mikelonis Aff. ¶15, C.A. App. 91. As other states with more favorable rate designs then sought to attract Michigan's large industries and as those industries seriously considered obtaining electricity from other sources, Consumers was compelled to look for ways to keep its customers. Mikelonis Aff. ¶55, C.A. App. 134-135.

Since Consumers could charge its large-load customers only what the MPSC authorized, its only option was to persuade the MPSC to accept a new rate proposal as being in the interests of all customers by encouraging industrial customers, like GM, to remain with Consumers. Consumers thus sought approval from the MPSC to market capacity that was available from its 1987 contract with its affiliate, MCV. Mikelonis Aff. ¶¶50, 55; C.A. App. 127-128, 134-135. Indeck intervened in both this and a later MPSC proceeding dealing with this new rate proposal. Mikelonis Aff. ¶¶51, 52, C.A. App. 129-132.

Because Michigan regulatory proceedings and associated appeals often take years to resolve, industrial customers, including GM, made it clear that they were unwilling to wait and instead would explore other options. With its case before the MPSC still pending, Consumers negotiated special discount contracts with these customers. Each of these

contracts, including the GM contract at issue here, required filing with and specific approval by the MPSC. Mikelonis Aff. ¶55, C.A. App. 134-135. The GM contract was approved in its entirety by the MPSC in a formal order.[4] That order was affirmed by the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal.[5]

After approving the Consumers-GM contract, the MPSC rejected one component of Consumers' rate proposal and approved another, stating:

> . . . [B]y allowing Consumers to compete with other generators, the proposed program may benefit other utility customers by reducing the risk

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4. The MPSC order in case no. U-10961 reads in part as follows:

> There are clear benefits in the contract for Consumers, including the substantial certainty that it will retain General Motors as a customer. There are clear benefits to General Motors, including a reduction in rates, improved quality of service, and assistance in identifying and implementing energy savings programs. There are benefits for other customers, including retaining General Motors' contribution to system fixed costs. *There are benefits to the general public, including the economic effects of retaining and potentially expanding automotive employment in the state.*

(Emphasis added.) Mikelonis Aff. Ex. 50, C.A. App. 165-166.

5. *Attorney General v. Michigan Public Service Commission*, Docket Nos. 193794, 193892 and 193894 (Mich. Ct. Appeals unpublished per curium opinion issued August 18, 1998), *leave to appeal denied*, 460 Mich 870 (1999).

> that the utility's largest (and, in many cases, highest load factor) customers will leave the system. *This part of the proposed settlement thus presents a measured first step in the process of redefining regulation to meet the evolving realities of the electric industry, as well as the needs of both the utility and its customers.* MPSC Order in Case No. U-10685, U-10754, U-10787; Mikelonis Aff. Ex. 51, C.A. App. 284. (Emphasis added.)

Thus, the contract between Consumers and GM, and all other special contracts of which Indeck complained, were a part of a comprehensive regulatory scheme adopted and supervised by the MPSC with clearly articulated policy considerations in mind. This resolution was appealed by the Attorney General and affirmed by the Michigan appellate courts, *Attorney General v. MPSC No. 2*, 237 Mich. App. 82 (1999), __ N.W.2d __, *leave to appeal denied*, 462 Mich. 866, __ N.W.2d __ (2000).

In addition to complaining about the GM contract, Indeck alleged that Consumers refused to offer it a reasonable standby rate; denied it access to essential facilities; denied it gas transportation; and denied it transmission service. Compl. ¶¶27, 28, 30, 32. Each of these matters was comprehensively regulated by the MPSC or the FERC. Consumers had three MSPC-approved rates for standby service. Interconnection was also an area fully regulated by the MPSC and FERC. Gas transportation service was provided by Consumers pursuant to an MPSC-approved tariff according to published rates. Finally, transmission service was also provided by Consumers pursuant to a FERC-approved tariff with a process in place for the agency to resolve disputes. Mikelonis Aff. ¶¶ 66-72, C.A. App. 151-158.

By specifying the rates, terms, conditions, and availability of services offered by a utility, the tariffs served as the instrument by which the regulator controlled and supervised the relationship between a utility and its customer. These tariffs were enforced by the MPSC and any person claiming a denial of services or denial of access under a tariff was free to petition the MPSC for relief. Indeck did not allege that it had ever sought such relief with respect to its claim that Consumers denied it any of these services.

Indeck now asserts that its claims that Consumers denied it access to essential facilities and refused to deal with it were the "principal allegation of the complaint." Pet. at 9 and 18 n.10. However, Indeck — in obvious recognition of the pervasive regulatory scheme described above — scarcely mentioned these allegations in the court of appeals, devoting less than a page of its 60-page brief to its argument that the MPSC did not regulate each of these areas of Consumers' business. *See* Pet. C.A. Brief, p. 39. In both the district court and court of appeals, Indeck's main challenge was to the Consumers-GM contract.

The court of appeals affirmed the district court's dismissal of Indeck's complaint. In a unanimous opinion, the court cited and followed this Court's rulings in *Brunswick v. Pueblo Bowl-O-Mat* and *Associated General Contractors v. California State Council of Carpenters*, as well as numerous other Sixth Circuit and other precedents.[6] Pet. App. 4a-5a: Contrary to Indeck's assertions (for instance, that the Sixth Circuit ruled that where consumers could assert claims, "*only* the consumers had antitrust standing"

6. *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Associated General Contractors of Cal. Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

(Pet. at 18)), the Sixth Circuit prudently applied the multi-factored law of antitrust standing. The Sixth Circuit looks to five factors, none of which is determinative, including "the causal connection" between the harm and the violation, the nature of the injury and the plaintiff's status, the directness of the injury and whether damages are speculative, concerns about duplicative recovery, and "the existence of more direct victims." (Pet. App. at 5a; quoting *Southhaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (CA 6 1983)). The Sixth Circuit also applies this Court's requirement that plaintiffs show antitrust injury. As set out in this Court's seminal *Brunswick* opinion, from which the court below quoted (at 4a): "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 429 U.S. at 489.

In applying the above-stated test, the Sixth Circuit examined a series of factors: Indeck was (allegedly) harmed only as a competitor, not through harm to competition; Indeck had not sufficiently pled facts showing harm to competition; and Indeck's (alleged) injuries were "indirect and speculative." Pet. App. at 5a-6a. GM's decision to purchase from Consumers rather than Indeck, for a limited period of time, did not show antitrust injury, where the complaint had no factual allegation showing how customers were thereby harmed. Thus, "a balancing of the factors to be considered in an antitrust standing case" established an absence of such standing. Pet. App. at 6a.

A similar analysis was applied to Indeck's remaining allegations. As to the discount contracts Consumers made with 17 other large customers, the Sixth Circuit held that Indeck had not alleged that it had contracts with any of them, or even had the ability to serve them. Pet. App. 7a. This holding correctly reflects the fact that Indeck could not conceivably have been harmed in an antitrust sense by Consumers continuing to do business with its own customers, at lower prices than before, where Indeck made no effort whatsoever to compete for those customers.[7] Compl. ¶¶39-41.

In dealing with Indeck's claim that Consumers had favored its affiliate, MCV, when Consumers purchased electricity, the Sixth Circuit noted the total absence of any factual allegation that competition in the sale of electricity had been "destroyed or damaged." Pet. App. 7a. Indeck instead pled only that it had been injured by not being selected as a power supplier to Consumers. Applying the well-established principle that injury to a competitor is not tantamount to injury to competition, the court of appeals correctly found no antitrust injury. In purchasing energy from its affiliate, Consumers naturally made a choice to not buy the equivalent amount of energy from Indeck. But, as the court of appeals observed, "any selection of a competitor in the marketplace will cause economic harm to the entities not chosen for the provision of goods or services." Pet. App. 7a. Given the absence of any factual allegations that Consumers' decision not to buy from Indeck affected

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7. As in the case of the GM contract, Consumers sought and obtained orders from the MPSC approving each of these 17 contracts. Those orders were affirmed by the Michigan appellate courts. Mikelonis Aff. ¶¶56-57 and Table D, C.A. App. 135-138. *See also* n.5.

competition generally and that Indeck's alleged harm reflected such anticompetitive effect, , the court correctly ruled that Indeck had failed to plead antitrust injury and therefore lacked antitrust standing.[8]

REASONS FOR DENYING THE WRIT

This case presents no exceptional circumstances warranting further review by this Court. Indeed, there are multiple reasons not to grant review. As set out below, a decision by this Court would neither determine the outcome of this litigation nor address Michigan statutes and regulations that have continuing vitality, and the legal issue presented to the Court is enmeshed in complicated factual and regulatory controversies that have been the subject of extensive state regulatory and judicial review. Most fundamentally, the Sixth Circuit applied settled law to reach a result entirely consistent with the law of this Court and other circuits.

1. The Sixth Circuit's Decision is Consistent With This Court's Precedents and Decisions of Other Circuits.

The Sixth Circuit cited to and correctly applied the key decisions of this Court on standing and antitrust injury, *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 (1977) and *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).[9]

8. As noted earlier, in buying power from others (including its affiliate) Consumers was obliged to pay the rates established by the MPSC. Mikelonis Aff. ¶¶46, 49, C.A. App. 122-123, 124-126.

9. The defendant in *Associated General Contractors* asserted both that plaintiff lacked antitrust standing and that the conduct alleged was immune from antitrust attack under the labor exemption. (Cont'd)

It further cited to and relied upon Second Circuit jurisprudence that supported the conclusion that Indeck failed to allege antitrust injury. The Sixth Circuit's holding on antitrust injury and standing thus was entirely unremarkable, concluding that petitioner was complaining only about harm to itself, not to competition, and that its alleged damages were too indirect and speculative to support antitrust standing. As explained by one of the cases on which petitioner relies, *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256 (CA 3 1998) (Pet. at 23):

> *Brunswick* tells us to intensify our focus and consider not only the fact that there may be an agreement which is harming others in the marketplace, but to also ask first whether the alleged injury is really of the type that the antitrust laws were intended to prevent, and, as part of that assessment, whether the injury flows from that which makes defendants' acts unlawful.

Id. at 266.

Few areas of antitrust law are as well settled as the antitrust injury and antitrust standing requirements. These requirements are critical to rationalizing the private enforcement of antitrust, especially given the temptation of

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(Cont'd)

While this Court did not deal with the exemption issue, it did observe that ". . .the [plaintiffs'] most specific claims of injury involve matters that are not subject to review under the antitrust laws." 459 U.S. at 526. That same situation obtains here, where the Sixth Circuit, while not reaching the state action defense, recognized that the district court had dismissed the complaint on the basis of the state action defense as well as lack of standing. Pet. App. 32a.

competitors to seek to use the antitrust laws to prevent hard competition and to recover for injury to a competitor, rather than competition. *See* William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445 (1985); William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 Va. L. Rev. 1221 (1989); and Frank Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263 (1981).

On four occasions, this Court has had to correct attempts by lower courts to limit the antitrust injury doctrine: *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981); and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Since *Atlantic Richfield*, however, the lower courts have understood antitrust injury and, as shown below, applied its requirements consistently, as the Sixth Circuit did in this case.

Petitioner has failed to identity meaningful deviations in the consistent line of cases dismissing antitrust complaints for lack of antitrust injury. Petitioner places principal reliance on two of this Court's opinions, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990). Pet. at 15-16. *Otter Tail Power* was decided four years *before* the antitrust injury doctrine was first enunciated in *Brunswick*, and involved a suit by the United States, which, unlike private plaintiffs, does *not* have to show antitrust injury. *Kansas v. Utilicorp* likewise did not address the antitrust injury doctrine, but rather applied the doctrine of *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), to prevent indirect-purchasing consumers

from seeking to recover an overcharge imposed on a public utility. Neither of those cases creates any tension with this Court's antitrust injury cases and the many lower court opinions applying them.

The consistency with which the lower courts have applied the antitrust injury requirement is manifest from petitioner's failure to identify any material differences in judicial holdings. Petitioner points principally to the Third, Seventh and Eleventh Circuits (Pet. 22-28). In fact, all three circuits are in harmony with Sixth Circuit law.

For the Third Circuit, petitioner gives greatest weight to two cases involving electric utilities, *Schuylkill Energy Resources v. Pennsylvania Power & Light Co.*, 113 F.3d 405 (CA 3 1997), *cert. denied*, 522 U.S. 977 (1997), and *City of Pittsburgh v. West Penn Power Co.*, *supra*. Pet. at 22-23. In both cases, however, the Third Circuit found that antitrust injury *was absent*, just as the Sixth Circuit did here. Like Indeck's complaint, the complaint in *City of Pittsburgh*, was full of the incantations of antitrust. The Third Circuit court was not persuaded by the words, but drilled down to the heart of the claims, stating that:

> . . . our courts have an obligation in matters before them to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon *the presence of a factual situation which is or is not justiciable*. We do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner.

Id. at 263. (Emphasis added.)

There, plaintiff alleged that the defendant utilities violated the antitrust laws by their proposed merger, which would have eliminated one of the utilities as a potential low-cost supplier to a redevelopment area in Pittsburgh. The district court's dismissal for lack of antitrust injury was affirmed by the Third Circuit, which held that the comprehensive regulatory framework in which both utilities operated restricted their competitive environment and that this regulatory background was an important factor in assessing whether plaintiff suffered antitrust injury. The court focused on the "realities of the regulated environment in which [plaintiff and the two defendants] were actors." *Id.* at 265. The same kind of regulatory environment forms the background of Indeck's allegations here.[10]

Petitioner also seeks support from *Angelico v. Lehigh Valley Hospital Inc.*, 184 F.3d 268 (CA 3 1999) (Pet. at 23), but that case is readily distinguishable. There the court held that a physician had standing to challenge a group boycott (a *per se* Sherman Act violation), that was preventing him from "competing in the market and thereby earning a living." *Id.* at 274. The court noted that the removal of plaintiff from the marketplace will cause "higher costs or poorer treatment" — the traditional results of anticompetitive behavior. That is not what Indeck complained of here, where its grievance

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10. *See also Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1243 (CA 3 1987), *cert. denied*, 486 U.S. 1059 (1988) (no antitrust injury when competitor complained that a rival's acquisition prevented it from increasing sales, since the plaintiff's harm could have occurred without the merger; "The antitrust laws . . . do not award damages or equitable relief for losses stemming from the failure of a competitor to bring about an increase in demand and price").

was that too much competition has injured it. In that regard, the court in *Angelico* specifically stated:

> This is not a case . . . in which we grant standing to a competitor *who was simply harmed by strong competition*. Rather, Angelico has asserted facts indicating that he was harmed by a conspiracy with an illegal anticompetitive intent."

Id. at 275. (Emphasis added.)[11]

For the Seventh Circuit, petitioner relies primarily on *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976 (CA 7 1980), *cert. denied*, 449 U.S. 1096 (1981). But there the court gave only perfunctory attention to antitrust injury in a brief discussion that failed to cite a single case. The issues on appeal were the ability of defendant to rely on the *Noerr-Pennington* doctrine and the substantive law of price squeezes. The court's holding on the latter point is severely undermined by the First Circuit's decision in *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (CA 1 1990). There, then Chief Judge Stephen Breyer, writing for a unanimous court, held that allegations of an illegal price

11. In recently dismissing a monopolization complaint for want of antitrust injury, a district court in the Third Circuit construed *Angelico* as follows: "Angelico concerned a surgeon excluded from the cardiothoracic surgery market by a boycott and conspiracy among hospitals and physician groups . . . Angelico is inapposite because the conspiracy was among rival physicians conspiring with hospitals to prevent plaintiff from competing with them." *Precision Surgical, Inc. v. Tyco Int'l, Ltd.*, 111 F. Supp. 2d 586, 590 (E.D. Pa. 2000) (citation omitted). *Brader v. Allegheny General Hospital*, 64 F.3d 869 (CA 3 1995), also relied upon by petitioner (Pet. 24) involved a similarly distinguishable claim of a horizontal conspiracy among health care professionals to boycott a rival physician.

squeeze against defendant were not legally sustainable because of the regulatory environment in which defendant operated: ". . . a price squeeze in a fully regulated industry such as electricity will not normally constitute 'exclusionary conduct' under Sherman Act §2." *Id.* at 28.[12]

Petitioner's citation to *Fishman v. Estate of Wirtz*, 807 F.2d 520 (CA 7 1986) (Pet. at 26) also is unavailing. That case raised the narrow question of whether the antitrust laws protect competition to acquire a natural monopoly and answered it in the affirmative. *Id.* at 533. That unique context for contemplating standing and antitrust injury says nothing about the application of those concepts in normal situations (where, for instance, consumers would be harmed were there an antitrust violation).

In fact, a whole series of Seventh Circuit cases demonstrates that court's endorsement of mainstream standing and injury law. Thus, in *Chicago Professional Sports Limited Partnership v. National Basketball Association*, 961 F.2d 667 (CA 7 1992), the Seventh Circuit noted that this Court's rulings in *Atlantic Richfield*, *Cargill* and *Brunswick*, require "every plaintiff to show that its loss comes from acts

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12. Chief Judge Breyer also participated in the First Circuit's affirmance of the dismissal of an antitrust suit brought by a discontinued juice distributor against a juice manufacturer because plaintiff had not demonstrated injury to competition, only injury to itself. *R.W. International Corp. v. Welch Food, Inc.*, 13 F.3d 478, 487 (CA 1 1994). The Court said: "Heavy-handed competitive tactics alone do not constitute an antitrust violation . . ." and went on to cite this Court's language in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341: "It is in the interest of competition to permit dominant firms to engage in rigorous competition, including price competition." 13 F.3d at 487, 488.

that reduce output or raise prices to consumers." *Id.* at 670. This decision was followed in *Stamatakis Industries, Inc. v. King*, 965 F.2d 469, 471 (CA 7 1992), where dismissal of an antitrust complaint was affirmed for lack of antitrust injury (". . . as in *Brunswick*, the plaintiffs' complaint is too much competition (injuring producers) rather than too little (injuring consumers.")).

To like effect is the Seventh Circuit's decision in *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins. Co.*, 784 F.2d 1325 (CA 7 1986), *reh'g denied*, 788 F.2d 1223 (1986). There, a group of 80 hospitals sued under the antitrust laws to enjoin Blue Cross/Blue Shield from forming its own preferred provider organization. The Seventh Circuit affirmed the district court's denial of a preliminary injunction. In a scholarly analysis of antitrust injury, the court found that plaintiffs — like Indeck here — were not championing vigorous competition, but really were only seeking to protect their own economic turf.

> When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust.
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> The books contain examples of firms that invoke the antitrust laws to obtain shelter from competition rather than to promote competition.
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> * * *

> Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals — sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. *These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds.* The antitrust laws are for the benefit of competition, not competitors.

Id. at 1334 and 1338. (Emphasis added.)

Other Seventh Circuit cases to like effect are *Ehredt Underground v. Commonwealth Edison Co.*, 90 F.3d 238, 240 (CA 7 1995), *cert. denied*, 519 U.S. 1056 (1997) ("Over and over, we stress that antitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business."); *O.K. Sand & Gravel v. Martin Marietta Technologies*, 36 F.3d 565 (CA 7 1994); *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391 (CA 7 1993), *cert. denied*, 510 U.S. 111 (1994); and *Israel Travel Advisory Serv., Inc.*, 61 F.3d 1250 (CA 7 1995), *cert. denied*, 517 U.S. 1220 (1996) (the court emphasized that the antitrust injury doctrine has its very basis in the notion that "acts harmful to business rivals generally help consumers," citing *Brunswick*. *Id.* at 1256).

For the Eleventh Circuit, petitioner relies heavily on *Key Enterprises of Delaware v. Venice Hospital*, 919 F.2d 1550 (CA 11 1990) (Pet. at 27-28), but fails to disclose that the Eleventh Circuit vacated this opinion, 979 F.2d 806 (CA 11 1992), and then, because the case had been settled, ordered the appeal and the complaint dismissed, 9 F.3d 893 (CA 11 1993), *cert. denied*, 511 U.S. 1126 (1994).

The still-valid Eleventh Circuit case discussed by petitioner, *Municipal Utilities Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493 (CA 11 1991), is of no assistance to it. The court held plaintiffs had standing to challenge a horizontal agreement among a score of rural electric cooperatives to cause the enactment of legislation to divide Alabama into territories and restrict the service areas of plaintiff municipal corporations (but the conduct was nevertheless found to be antitrust-immune state action). The court found a "close relationship between the Cities' claimed injury and the alleged antitrust violation," since the questioned legislation banned them from areas where they had competed. *Id.* at 1500. The legislation would "directly injure" plaintiffs, so they were "an efficient enforcer of the antitrust laws", which is a separate requirement. *See Florida Seed Co. v. Monsanto Co.*, 105 F.3d 1372, 1374 (CA 11 1997), *cert. denied*, 522 U.S. 913 (1997). A horizontal boycott case directly restricting the geographic scope of plaintiffs' competition teaches little about a complicated fact pattern where a utility charges government-approved rates and enters into government-approved purchase and sale arrangements. The real Eleventh Circuit lesson, which was valid before and after *Municipal Utilities*, is that injuries conferring antitrust standing must "coincide with the public detriment tending to result from the alleged violation." *Florida Seed*, 105 F.3d at 1375 (citation omitted). Petitioner's claimed injuries do not pass this test.[13]

Other Circuits have followed the same principles that guided the Sixth Circuit here. *See, e.g., Dial A Car, Inc. v. Transportation, Inc.*, 82 F.3d 484, 486 (CA D.C. 1996)

13. *See also Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (CA 11 1991) (excluded competitor denied standing because it was not the most efficient enforcer of the antitrust laws).

("appellant must allege facts that would show an anticompetitive impact on the market as a whole"); *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 766-67 (CA 2 1995), *cert. denied*, 516 U.S. 944 (1995); (distributors who lost distribution rights through alleged predation lacked antitrust standing because those rights could have been simply terminated, without recourse); *Eichorn v. AT&T Corp.*, 2001-1 CCH Trade Cases ¶73,241 (CA 9 2001) (an antitrust injury must reflect an activity's anti-competitive effect on the competitive market); *McDaniel v. Appraisal Institute*, 117 F.3d 421 (CA 9 1997) (plaintiff must show injury to competition, not simply injury to itself); *Legal Economic Evaluations, Inc. v. Metropolitan Life Insurance Co.*, 39 F.3d 951, 954 (CA 9 1994), *cert. denied*, 514 U.S. 1044 (1995) ("Exclusion of a competitor may be a necessary condition to finding that a group boycott or refusal to deal violates the antitrust laws, but it is not a sufficient condition for finding antitrust injury").

In addition to its strained reading of the case law, petitioner also mischaracterizes the Sixth Circuit's holding. It claims that the Sixth Circuit held that only consumers have antitrust standing. Pet. at 18. The Sixth Circuit made no such holding, but instead merely found that injury to a competitor, without injury to competition, will not support standing. In so ruling, the court was well within the mainstream of an unusually well-settled part of antitrust law. Petitioner does not dispute this, conceding that, under this Court's precedents, to establish antitrust injury a plaintiff must plead facts showing "a competition-reducing aspect or effect of the defendant's behavior," and that a plaintiff may not assert antitrust injury "based merely on profits the plaintiff lost when a defendant reduced its prices, even if the defendant's goal was to drive out competition." Pet. at 14.

Having conceded these points, petitioner nevertheless ignores the case it sought to present in the courts below, where it essentially alleged no more than that it had lost out in a competitive bidding war over who would sell electricity to a GM plant in a totally regulated environment. In this Court, petitioner barely mentions that competitive battle, completely ignores that regulatory environment and instead attempts to reinvent its case to focus on an alleged refusal by Consumers to provide petitioner with so-called "essential services" (again totally ignoring the pervasive regulatory environment — state and federal — that applied to them). But all of those services had importance to petitioner only if it first obtained GM as its customer. Petitioner surely was not interested in purchasing stand-by energy or in the means to transmit it unless it had a customer to whom it would be sold. And, because petitioner had no contracts with the large industrial customers who entered into limited-term discount contracts with Consumers, any alleged harm to petitioner was therefore entirely speculative, as the Sixth Circuit correctly held.

The Sixth Circuit, like the others who have spoken on the issue, has consistently applied the factors established by this Court to determine antitrust injury and standing. It did so in the decision below, which conflicts neither with this Court's precedents nor with the applicable case law in the other circuits.

2. Independent Grounds Support the Decision Below.

Because of its ruling on antitrust injury and standing, the court of appeals found it unnecessary to reach the principal basis upon which the district court relied in dismissing Indeck's complaint: all of the conduct complained of was subject to the state action doctrine. Applying the two-

prong analysis that this Court established in *Midcal*[14], the district court held that . . . "Michigan has clearly articulated a policy to displace unfettered competition and replace it with a regulatory system . . ." and that "Michigan, through the MPSC, actively supervised independent contracts and the introduction of competition among electrical providers." Pet. App. 19a, 22a.[15] Thus, consideration of the antitrust injury issue raised in the petition will not dispose of this litigation and therefore has no practical importance.

3. The Conduct of Which Indeck Complains Was the Subject of Lengthy and Complex Proceedings Before the MPSC and the Michigan Courts or Was Otherwise Subject to Administrative Remedies.

The thrust of Indeck's case below was the subject of numerous administrative and judicial proceedings in Michigan — proceedings never disclosed in the petition.

- The contract between Consumers and GM was approved in its entirety by the MPSC, which reaffirmed its approval upon rehearing

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14. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

15. Several circuits have recently rejected, on state action grounds, similar suits by cogenerators against regulated public utilities. *See TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (CA 11 1996), *amended*, 86 F.3d 1028 (1996); *Nuggett Hydroelectric v. Pacific Gas & Electric Co.*, 981 F.2d 429 (CA 9 1992), *cert. denied*, 508 U.S. 908 (1998); *Schuykill Energy Resources v. Pennsylvania Power & Light Co.*, 113 F.3d 405 (CA 3 1997), *cert. denied*, 522 U.S. 977 (1997).

requested by the Michigan Attorney General.[16] The Michigan Court of Appeals affirmed the MPSC and the Michigan Supreme Court denied leave to appeal.[17]

• Each of the other discount contracts between Consumers and 17 of its existing customers was approved by specific orders of the MPSC.

• The amount of power procured by Consumers from all cogenerators, whether affiliates like MCV or non-affiliates like Indeck, and the rates to which these suppliers were entitled, were all determined by the MPSC, whose orders were affirmed by the Michigan courts.

• All of the allegedly exclusionary conduct was subject to detailed regulation by the MPSC and FERC. Both agencies provide administrative remedies for aggrieved parties, yet Indeck made no claim that it exhausted (or, indeed, even pursued) such remedies.

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16. The Michigan Attorney General, an elected official and long an opponent of the utility industry in Michigan, filed amicus briefs in the district court and the court of appeals, arguing that respondents should not be entitled to rely on the state action defense, but took no position on the antitrust injury issue. The MPSC, which under Michigan law has exclusive jurisdiction over public utilities, did not join in those briefs. Recently, the Michigan Court of Appeals ruled that the Attorney General could not both represent the MPSC and oppose it on the same issue, as had been the prior practice. *Attorney General v. MPSC*, 243 Mich. App. 487 (2000), __ N.W.2d __.

17. *See* footnote 5, *supra*.

In this case, Indeck sought either to relitigate matters it pursued, unsuccessfully, before the MPSC, or sue over matters that both federal and Michigan law delegated to administrative agencies, making entirely academic any further review of the antitrust injury issue.

4. Michigan's Electric Utility Industry Has Been Substantially Transformed Since Indeck Filed Its Complaint.

Michigan, like many other states, is grappling with seismic changes in the business of generating and distributing electricity. While ostensibly pursuing "deregulation," Michigan enacted a new law in June 2000 that radically changes the regulatory landscape for electric utilities. Known as the Customer Choice and Electricity Reliability Act, MCLA 460.10, this statute moots many of Indeck's alleged grievances about the difficulties in competing in Michigan in 1995-1996. The actions about which Indeck complained are now subject to an entirely new set of detailed regulatory requirements. Among other things, this new statute:

- establishes a statutory maximum (30%) for generating capacity that can be under the control of an electric utility in any relevant market (MCLA 460.10f);

- provides for remedies (including divestiture) against a utility which exceeds the 30% limit (MCLA 460.10f);

- requires utilities either to divest ownership of their transmission facilities or to divest complete operational control over them by joining a FERC-

approved regional transmission organization (MCLA 460.10w);

• requires that "merchant plants," like that proposed by Indeck, come under the jurisdiction of the MPSC, and subjects business by them with customers like GM to MPSC regulatory control (MCLA 460.10a(2) and (4); 10c; 10g(a) and (d); 10p(5); 10q(1) and (2); and 10(r));

• changes the rules regarding the obligation of a utility to provide stand-by power (MCLA 10b(4) and (5));

• expressly "grandfathers" the discount contracts described at pages 2-3, *supra* (MCLA 10aa);

• specifically disclaims any intention to upset the power supply arrangements made by Consumers with any supplier, including its affiliate MCV (MCLA 10a(8)); and;

• gives all retail customers the ability to buy power directly from suppliers like Indeck beginning January 1, 2002 subject to the provisions of the act (MCLA 10a(1) and 10a(5)).

Given these enormous changes in Michigan's public utility regulation, the facts alleged in Indeck's complaint will never arise again.

CONCLUSION AND RELIEF

Petitioner Indeck has attempted to relitigate in the federal courts matters that are fully covered by Michigan's utility regulatory scheme, in which it has been an active, but largely unsuccessful, participant. There is no reason for this Court to review the unanimous opinion of the Sixth Circuit. That opinion involved a straight-forward application of established antitrust doctrine. Moreover, further review would neither dispose of the case, because of the alternate basis on which the district court dismissed the complaint, nor address an issue in a live legal context, because the complex regulatory scheme in which the challenged acts occurred has already been superseded by a new statute.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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